

In so doing, he purported to act under section 2(2) of the Trade Unions Ordinance 1959 which reads:—

"2(2) For the purposes of the definition of 'trade union' in sub-section (1) and for the purposes of sections 72 and 74, 'similar' means similar in the opinion of the Registrar."

It should be noted at this stage that his opinion was not conclusive. Section 17(1) of the Trade Unions Ordinance gives a right of appeal to the Minister of Labour and Manpower within 30 days against his decision. Section 17(4) provides that the decision of the Minister on appeal shall be final and shall not be called into question in any court.

No objection was taken however by the respondents upon the ground that the proper recourse of the applications was by way of appeal from the decision of the Registrar to the Minister or that the court was not by statutory intervention properly seized of the matter, until, at the least, the Minister had made his order.

Objection was however taken to the form of the application. It was argued as a preliminary point that the application did not properly come within the scope of Order 54A of the Rules of the Supreme Court and that in the absence of any provision for such a matter, the application should be by action. This objection was founded on the recent judgment of my brother Abdoalcader J. in *Sungai Wangi Estate v. Uni*.⁽¹⁾ But in that case, what the learned judge held was that no declaration could be applied for by way of originating motion save in such cases as have been expressly provided for by statute.

Insofar as an originating summons under O.54A is concerned, the decision must be determined by the consideration whether the subject-matter came within the provisions of this Order.

Mr. D.P. Vijandran contended that the construction of the rules of the trade union came within O.54 r.1, but to my mind, the rules could not, by the *ejusdem generis* principle of construction, come within the "deed, will or other written instrument" in that rule.

The application of the second set of orders said to involve the construction of section 2(2) of the Trade Unions Ordinance could by the provisions of Rule 1A be brought on an originating summons, but if I am right in using the *ejusdem generis* rule, then my decision must necessarily affect it.

I took the further view that it would not be possible to divorce the consideration of the application from certain facts pertaining to the work of electrical workers and the work of electronic workers respectively and in all the circumstances of the case, thought the objection well-founded. I therefore struck out the application and allowed, though I should have thought no leave was necessary, the applicants to proceed by action. The applicants will now determine whether they wish to do so.

Order accordingly.

Solicitors: Vijandran & Zulkifli.

METAL INDUSTRY EMPLOYEES UNION v. REGISTRAR OF TRADE UNIONS & ORS.

[O.C.J. (Wan Suleiman F.J.) May 14, 1975]

[Kuala Lumpur — Originating Summons No. 371 of 1973]

Practice and Procedure — Originating Summons — Application for declaratory orders — Alternative remedy provided by law — Trade Unions Ordinance 1959, s. 17 — R.S.C. 1957, O.54A.

This was an application by originating summons for declaratory orders on the rules of a trade union and certain provisions of the Trade Unions Ordinance 1959. The respondent objected to the form of the application.

Held: the court should not be invited to make the declaration sought since an alternative remedy was clearly prescribed by the law by way of appeal to the Minister under section 17 of the Trade Unions Ordinance, 1959.

Cases referred to:—

- (1) *Lewis v. Green* [1905] 2 Ch. 340.
- (2) *Manggai v. Government of Sarawak & Anor.* [1970] 2 M.L.J. 41.
- (3) *Wilkinson v. Barking Corporation* [1948] 1 K.B. 721, 724.
- (4) *Foh Hup Omnibus Co. Bhd. v. Minister of Labour & Manpower & Anor.* [1973] 2 M.L.J. 38.

ORIGINATING SUMMONS.

D.P. Vijandran for the applicants.

Lim Beng Choon (Senior Federal Counsel) for the first and second respondents.

M. Shanker for the third respondent.

Wan Suleiman F.J. (delivering judgment on preliminary objection): The applicants in this Originating Summons seek the following orders and reliefs:—

- a) A declaration that the workers of the Selangor Pewter Company Sdn. Bhd. are workers engaged in the metal industry.
- b) A declaration that the workers employed by Selangor Pewter Company Sdn. Bhd. are within the scope of membership of the Metal Industry Employees' Union under Rule 3(1) of its Rules.
- c) A declaration that the Metal Industry Employees' Union is entitled to register the said workers as its members.
- d) A declaration that the Registrar of Trade Unions is not empowered under section 2(2) of the Trade Unions Ordinance, 1959 or any other legal provision to rule that the workers of the Selangor Pewter Co. Sdn. Bhd. cannot properly be members of the Metal Industry Employees' Union.

The respondents raised a preliminary objection. Firstly it was contended on their behalf that Order 54A of the Rules of the Supreme Court under which this application is being made is only intended to enable the court to proceed where its decision will settle the litigation between the parties, and not for consideration of questions which will only start litigation if the decision is made in a particular way. For this proposition counsel for the respondents rely on the case of *Lewis v. Green*,⁽¹⁾ which it seems to me applies to Rule 1 of the Order but not to Rule 1A, the particular rule which applies to this application, since it involves the construction of a statute, to wit, Trade Unions Ordinance, 1959. Accordingly I am unable to agree with this part of respondents' contention.

I think I need deal with the only other objection which to my mind is whether in view of the provisions of section 17 of the Trade Unions Ordinance, 1959 (as amended by Act 90) the High Court has the discretion or for that matter any jurisdiction at all to interfere with the ruling of the Registrar of Trade Unions.

It would be useful to set out briefly the facts leading to the present application, as set out in the Affidavit of Harun bin Haji Nawawi, the President of the Applicant Union:—

"2. The applicant Union (hereinafter referred to as 'the Union') is duly registered with the Registrar of Trade Unions and represents employees engaged in the Metal Industry.

3. The first respondent is the Registrar of Trade Unions (hereinafter referred to as 'the Registrar') and was at all material times acting on behalf of and/or as servant or agent of the second respondent.

4. The third respondent is a private limited company (hereinafter referred to as 'the company') registered under the Companies Act, Malaysia and dealing in the manufacture of pewter products.

5. The Union has sought and is seeking to register as its members the workers of the Company.

6. On May 2, 1973 the Union wrote to the Company asking the latter to accord recognition to the Union as representing the workers of the Company. (A copy of the said letter is attached as an exhibit hereto and marked 'P1').

7. On June 7, 1973, not having received a positive response from the Company the Union referred the question of recognition to the Minister of Labour and Manpower. (A copy of the letter is attached as an exhibit hereto and marked 'P2').

8. On June 12, 1973 the Ministry replied to the Union stating that before the question of recognition could be decided, it was necessary to decide the issue as to whether the Union was entitled to represent the workers and that this second question was being referred to the Registrar of Trade Unions for his decision. (A copy of the said letter is attached as an exhibit hereto and marked 'P3').

9. On June 19, 1973 the Union met the Registrar of Trade Unions to discuss the said question.

10. On June 21, 1973 the Registrar wrote to the Union stating that the workers of the Company could not properly be registered as members of the Union. (A copy of the said letter is attached hereto as an exhibit and marked 'P4').

11. On July 6, 1973 the Company replied refusing recognition on the ground that the Union was not the right Union to represent the workers of the Company. (A copy of the said letter is attached hereto and marked 'P5').

12. On July 17, 1973 the Union through its solicitors wrote to the Registrar asking permission to register the workers. (A copy of the said letter is attached as an exhibit hereto and marked 'P6').

13. On July 27, 1973 the Registrar replied maintaining his earlier ruling. (A copy of the said letter is attached hereto as an exhibit and marked 'P7')."

It will be observed that though the Registrar used the expressions "tidak berapa sesuai" i.e. not quite suitable in P4 and "tidak sesuai" i.e. not suitable in P7 in connection with the workers in Selangor Pewter Company Sdn. Bhd., he had by necessary implication ruled that such workers did not belong to a *similar* trade as those already in the Applicant Union, and was therefore giving his opinion within the meaning of section 2(2) of the Trade Unions Ordinance 1959. Indeed the parties to this application regard the two letters, P4 and P7, as an expression of such an opinion.

My attention has been drawn to a number of authorities which have a bearing on the point in issue.

In *Manggai v. Govt. of Sarawak and Anor.*⁽²⁾ the applicant was the successful party in a dispute decided by the district native court, Simanggang. On appeal by the other party to the Resident's native court, the appeal was allowed and the decision of the district native court quashed.

Applicant then applied to the High Court, Kuching, for a declaration *inter alia* that the Resident's native court was *functus officio* and without jurisdiction to hear the case by way of appeal or otherwise and that the purported judgment delivered by that court was null and void. The applicant did not pursue his right of appeal to the Native Court of Appeal.

Under Section 8(1)(d) of the Native Courts Ordinance an appeal lies from the decision of the Resident's native court to the Native Court of Appeal.

The High Court refused this application for a declaration and the Federal Court, in upholding that decision held, citing a passage from *Halsbury's Laws of England*, third edition, volume 22, Page 749, paragraph 1611 —

"It is well settled law that the court will not make a declaratory judgment where an adequate alternative remedy is available."

I need refer to only one of the authorities cited with approval in the Federal Court judgment, the case of *Wilkinson v. Barking Corporation*⁽³⁾ wherein Asquith L.J. said —

"...It is undoubtedly good law that where a statute creates a right, and in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others."

The English Courts have declined to entertain jurisdiction where a plaintiff seeks to bypass the appointed tribunal by seeking a declaration instead of following the prescribed statutory procedure. (See footnote 68 in *S.A. de Smith's Judicial Review of Administrative Action*, Page 520).

This is precisely what the applicants are seeking to achieve, because section 17(1) of the Trade Unions Ordinance, 1959 requires that an appeal against any opinion of the Registrar given under section 2(2) of the Ordinance should be to the Minister. The word "may" in the clause "may within thirty days appeal to the Minister" does not, in my view give the applicants a choice of tribunals, as counsel for the applicants suggests, but merely gives them option to appeal to the Minister should they so desire.

It is true that if there had been an appeal to the Minister and that decision was a nullity, the courts would have jurisdiction. (See *Foh Hup Omribus Co. Berhad v. Minister of Labour and Manpower & Anor.*⁽⁴⁾)

Mr. Vijandran however says that it is the opinion of the Registrar in Exhibit P4 and P7, which is a nullity, since he has no powers to give such opinion under section 2(2) of the Ordinance, so that the question of appeal to the Minister does not arise.

Perhaps it would be more profitable for the parties to find out whether, in using the expressions "not quite

suitable" in P4 and "not suitable" in P7 with reference to the workers of the third respondents (The Selangor Pewter Co. Sdn. Bhd.) the Registrar meant that they are not in a *similar* trade, occupation or industry as those in the applicant Union, if the parties to the present proceedings are in any doubt about that.

Neither party seem to be in doubt that that was exactly what the Registrar meant, in which event there can be no doubt that the expression of such opinion is well within his powers as given by section 2(2).

I am therefore of the view that the respondents are right and that the court should not be invited to make the declarations sought since an alternative remedy is clearly prescribed by law.

The preliminary objection is therefore allowed and the application dismissed with costs.

Objection allowed.

Solicitors: *Vijandran & Zukifli; Shearn Delamore & Co.*

LEE WENG SANG v. PUBLIC PROSECUTOR

[A.Cr.J. (Hashim Yeop A. Sani J.) May 16, 1975]
[Ipoh — Criminal Appeal No. 107 of 1974]

Criminal Law and Procedure — Joint charge — Plea of guilty by one of accused — Duty of prosecution — Necessity of showing that the firearm is serviceable — Firearms (Increased Penalties) Act 1971, ss. 2 and 8.

In this case the appellant had pleaded guilty to a charge of unlawful possession of a pistol and a grenade and ammunition. The appellant had been charged jointly with another person but his co-accused claimed to be tried. No evidence was produced to show that the pistol and grenade were serviceable.

Held: (1) the plea of guilty of the appellant should not have been considered until after the trial of the other person;

(2) the Firearms (Increased Penalties) Act 1971 is certainly a penal Act and therefore section 8 must be construed and must be read in conjunction with the definition of section 2 of the Act. Therefore for an offence to be created it must be shown that the firearm concerned is capable of discharging a shot, bullet or other missile by means of an explosive charge which simply means that the firearm was in a serviceable condition. The fact that an accused pleaded guilty to the charge did not absolve the prosecution from showing that the firearm concerned was in a serviceable condition.

CRIMINAL APPEAL.

Paramjit Singh for the appellant.

Wan Abdul Majid bin Wan Hamid (Deputy Public Prosecutor) for the respondent.

Hashim Yeop A. Sani J.: This was an appeal against the sentence imposed in the Special Sessions Court in Ipoh on October 10, 1974 where the Appellant had pleaded guilty to two charges of unlawful possession of a pistol and a grenade and also of unlawful possession of 54 rounds of 9 mm live ammunitions. In respect of the charge for unlawful possession of the pistol and the grenade, the Appellant was sentenced to 7 years' imprisonment and 6 strokes of the rotan under section 8 of the Firearms (Increased Penalties) Act, 1971 and in respect of the charge for

A unlawful possession of the live ammunitions, the Appellant was sentenced to 3 years' imprisonment under section 9(a) of the Arms Act, 1960, both sentences to run concurrently.

At the commencement of the hearing of the appeal counsel for the appellant sought permission to address the court on a number of points pertaining to the records of the learned Special President with a view to invite the court to exercise its revisionary powers under the Criminal Procedure Code. Permission was granted and on behalf of the appellant three main points were raised with regard to the records. The first point, which I dismissed summarily, was that the records of the learned Special President did not indicate that the provision of section 173(b) of the Criminal Procedure Code (F.M.S. Cap. 6) was complied with in that when the appellant was brought again before the learned Special President on October 10, 1974 the proviso to that paragraph of section 173 was not fulfilled since it was not stated in the records on that date that the appellant then understood the nature and consequences of his plea and intended to admit without qualification to the offence. On perusing the records I found absolutely nothing wrong in the proceeding on the date in question because the appellant had in fact been produced before the learned Special President a number of times before that date and that when he was first produced on September 19, 1974 it was recorded that the court was satisfied that when the appellant wanted to plead guilty he understood the nature and consequences of his plea. When he was again produced on October 10, 1974 the charges were read again and the appellant still maintained his plea of guilty.

The second point raised on behalf of the appellant was that according to the facts disclosed by the prosecuting officer there were in all three bags found by him but of these only one paper bag was clearly and expressly said to be found in the room occupied by the appellant and another person. As possession is of paramount importance in this offence, it was contended on behalf of the appellant that the facts disclosed created a doubt as to the possession by the appellant of the other articles in the other two bags. I also dismissed this point because the records pertaining to the facts stated by the prosecuting officer should be read as a whole. It was clear from the records that the police officer went to a room occupied by, and rented to, the appellant and another person. In the room the police officer found the appellant and the other person and upon searching the room, the officer found the articles which were produced.

The third point raised on behalf of the appellant was that the facts disclosed by the prosecution following the plea of guilty did not disclose an offence under the Firearms (Increased Penalties) Act, 1971 as specified in the first charge on the grounds that there was no evidence, in fact not even a bare statement, that the pistol was serviceable. From the records of the learned Special President it would appear that the prosecuting officer made a bare statement that the police officer when searching the room found a "live grenade" in a bag (Exhibit P4), but nothing was mentioned about the serviceability of the pistol.

The final point and this was the point to which I drew the attention of counsel for the appellant, was